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8

9 UNITED STATES DISTRICT COURT  
10 NORTHERN DISTRICT OF CALIFORNIA  
11 SAN FRANCISCO DIVISION

12  
13 RAHINAH IBRAHIM, an individual,  
14 Plaintiff,  
15 v.  
16 DEPARTMENT OF HOMELAND  
SECURITY, et al.  
17 Defendants.

CASE NO. C06-0545 WHA

**PLAINTIFF'S OPPOSITION TO  
MOTION TO QUASH SUBPOENAS  
FILED BY DEPARTMENT OF  
HOMELAND SECURITY, FEDERAL  
BUREAU OF INVESTIGATION, AND  
DEPARTMENT OF STATE**

18 Date: December 7, 2009  
Time: 2:00 p.m.  
19 Ctrm: 9, 19th Floor  
Judge: The Hon. William H. Alsup

## TABLE OF CONTENTS

1		
2		
3	INTRODUCTION .....	1
4	BACKGROUND .....	2
5	A.    Visa Subpoenas.....	2
6	B.    Percipient Witness Subpoenas .....	3
7	ARGUMENT .....	4
8	A.    The Federal Government Has Waived Any Privilege Objection to	
9	the Subpoenas Because It Failed to Timely Serve a Motion to	
10	Quash or Objections.....	4
11	B.    District Courts Apply Federal Discovery Rules to Discovery	
12	Requests Made Against Government Agencies, Whether or Not	
13	the Agency is a Party .....	4
14	C.    Ibrahim Has Issued Valid Subpoenas to Which the Government	
15	Must Be Compelled to Respond Because the Information is	
16	Discoverable Factual Information and Testimony of Percipient	
17	Witnesses .....	5
18	1.    The Subpoenas for Documents Related to Ibrahim’s Visa	
19	Status Seek Discoverable Information.....	5
20	2.    The Subpoenas for Testimony by Paul C. Woods and Lee	
21	Korman Seek Discoverable Information .....	6
22	3.    The Cases Cited by the Federal Government for the	
23	Proposition that Ibrahim Must Undergo the <i>Touhy</i>	
24	Procedures Do Not Apply .....	7
25	D.    Even If <i>Touhy</i> Applies to the Discovery Requested, Ibrahim Has	
26	Already Complied with <i>Touhy</i> .....	8
27	E.    Ibrahim Seeks Leave to Amend Her Complaint to Add Claims	
28	Against the Federal Agencies For Their Refusal To Provide	
	Requested Discovery .....	8
	CONCLUSION .....	9

**TABLE OF AUTHORITIES**

**Cases**

*Cable & Computer Technology, Inc. v. Lockheed Saunders, Inc.*

175 F.R.D. 646 (C.D. Cal. 1997) ..... 6

*Exxon Shipping Co. v. United States Dept. of Interior*

34 F.3d 774 (9th Cir. 1994) ..... 2, 5, 7, 8

*FBI v. Superior Court of the State of Cal.*

507 F. Supp.2d 1082 (N.D. Cal. 2007) ..... 7

*In re DG Acquisition Corp.*

151 F.3d 75 (2d Cir. 1998)..... 4

*In re Recalcitrant Witness Richard Boeh v. Gates*

25 F.3d 761 (9<sup>th</sup> Cir. 1994)..... 5, 7

*King v. Fidelity Nat’l Bank of Baton Rouge*

712 F.2d 188 (5<sup>th</sup> Cir. 1983) ..... 4

*Lopez v. Chertoff*

2009 WL 1575209 (E.D. Cal.)..... 8

*Oakes v. Halvorsen Marine Ltd.*

179 F.R.D. 281 (C.D. Cal. 1998) ..... 6

*Touhy v. Ragen*

340 U.S. 462 (1951)..... 4, 5, 7, 8, 9

*U.S. v. Mejia*

69 F.3d 309 (9<sup>th</sup> Cir. 1995) ..... 6

*United States v. Henson*

123 F.3d 1226 (9<sup>th</sup> Cir. 1997) ..... 7

**Statutes, Rules, Regulations and Other Authorities**

5 U.S.C. § 301 ..... 5

5 U.S.C. § 702 ..... 9

Fed. R. Civ. Proc. 26(b)(1) ..... 5

1	Fed. R. Civ. Proc. 45(c)(2)(B) .....	4
2	Fed. R. Evid. 43(a) .....	5
3	Schwarzer, Tashima & Wagstaff, California Practice Guide: Federal Civil Procedure Before	
4	Trial, § 11.21 (1995 revised).....	6
5		
6		
7		
8		
9		
10		
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12		
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**INTRODUCTION**

The federal government's motion seeks to quash four subpoenas served by Rahinah Ibrahim in this case:

1. Subpoena to the Department of Homeland Security to produce documents and information regarding a) Rahinah Ibrahim's September 29, 2009 visa interview in Kuala Lumpur, Malaysia; b) Ibrahim's current visa application; and c) any decision on Ibrahim's current visa application;

2. Subpoena to the Department of State to produce documents and information regarding a) Rahinah Ibrahim's September 29, 2009 visa interview in Kuala Lumpur, Malaysia; b) Ibrahim's current visa application; and c) any decision on Ibrahim's current visa application;

3. Subpoena for testimony and documents to Paul C. Woods, an FBI agent who, according to the police report,<sup>1</sup> spoke to the San Francisco police regarding Ibrahim on the day of her arrest.

4. Subpoena for testimony and documents to Lee Korman, a TSA Inspector who, according to the police report, was at the scene of the arrest and communicated with the San Francisco police regarding Ibrahim on the day of her arrest.

The first two subpoenas relate to Ibrahim's ability to obtain a visa and travel here to testify in her case. The last two subpoenas seek testimony of percipient witnesses (Paul Woods and Lee Korman) who have personal knowledge regarding Ibrahim's arrest and the alleged bases therefore.

The government's sole objections to these subpoenas is that Ibrahim must comply with the *Touhy* procedures. However, the government's reliance on *Touhy* to shield it from discovery

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<sup>1</sup> By referring to the police report, Ibrahim does not make any representation or assumption as to its accuracy, nor does she waive any objection to its admissibility. However, in conducting discovery, Ibrahim must use the sources available to her to determine the likely witnesses to the events in question.

1 in this case is misplaced. The Ninth Circuit has held that *Touhy* does not create an independent  
2 privilege for the federal government to withhold information and that district courts should apply  
3 the federal rules of discovery when evaluating discovery requests made against government  
4 agencies, whether or not the United States is a party to the underlying action. *See Exxon*  
5 *Shipping Co. v. United States Dept. of Interior*, 34 F.3d 774, 780 (9th Cir. 1994) Therefore, this  
6 Court has the authority to consider whether the discovery will be allowed pursuant to the Federal  
7 Rules of Civil Procedure. Here, the discovery is proper because it seeks information and  
8 documents from percipient witnesses that were relied upon and created at or around the time of  
9 the events in question. The government should therefore be ordered to comply with the  
10 subpoenas.

## 11 **BACKGROUND**

### 12 **A. Visa Subpoenas**

13 On September 9, 2009, counsel for the defendants requested that Ibrahim travel to the  
14 United States for her deposition in this case. *See* Declaration of Elizabeth Pipkin in Support of  
15 Plaintiff's Opposition to Motion to Quash Subpoenas Filed by Department of Homeland  
16 Security, Federal Bureau of Investigation, and Department of State ("Pipkin Decl."), ¶ 2. As  
17 soon as defendants requested that Ibrahim travel to the U.S. for her deposition, Ibrahim prepared  
18 her visa application and attended her visa interview on September 29, 2009. This was the  
19 earliest possible date by which she could complete the application and schedule the visa  
20 appointment.

21 Ibrahim necessarily attended the visa interview without her counsel, as her counsel is in  
22 the U.S. At her visa interview on September 29, the federal government took the opportunity to  
23 ask Ibrahim several questions about her legal strategy, including why she hired a lawyer in the  
24 United States and what she wanted to settle her case. *See* Pipkin Decl., ¶ 3. These questions had  
25 no conceivable relation to Ibrahim's eligibility for a U.S. visa and were highly intimidating. It  
26 was also improper to question a represented party about such matters without the presence of her  
27 counsel. After the interview was completed, Ibrahim was told that she would receive a decision  
28 on her visa application within one to two weeks. *See* Pipkin Decl., ¶ 3. As of November 19,

2009 (over seven weeks since the visa interview), she has received no decision.

On September 29, 2009, counsel for Ibrahim wrote to the Department of Justice objecting to the improper questioning of Ibrahim regarding legal strategy without her counsel present. Ibrahim received no response. Ibrahim's counsel then issued the subpoenas in question to the Department of State and the Department of Homeland Security in an attempt to learn what had happened at Ibrahim's visa interview and to obtain any documents related to any possible delay in her visa application. The Department of Homeland Security was served on October 14, 2009. *See* Pipkin Decl., ¶ 6, Exh. C. The Department of State was served on October 16, 2009. *See* Pipkin Decl., ¶ 5, Exh. B.

On November 5, 2009, counsel for the Department of State and the Department of Homeland Security wrote Ibrahim's counsel giving Ibrahim one day to withdraw the subpoenas. *See* Pipkin Decl., ¶ 7, Exh. D. Ibrahim responded and the parties met and conferred further on November 9, 2009. *See* Pipkin Decl., ¶ 8, Exh. E.

On November 6, 2009, the Court conducted a conference with the remaining parties regarding the location of Ibrahim's deposition. At that time, the Court requested that a letter be written to the Department of Homeland Security and the Department of State requesting a decision on Ibrahim's visa by November 25, 2009 so that Ibrahim may make travel arrangements and appear for her deposition on December 7, 2009. Ibrahim's counsel wrote the letter to the relevant agencies and the U.S. Embassy in Kuala Lumpur. *See* Pipkin Decl., ¶ 9, Exh. F. Ibrahim has received no response.

#### **B. Percipient Witness Subpoenas**

The San Francisco Police Department has made clear that it intends to rely on instructions that it allegedly received from the federal government to justify its wrongful arrest of Ibrahim. *See* Notice of Motion and Motion for Order Authorizing Disclosures by San Francisco Defendants (Doc. #238), at p. 1. Ibrahim therefore needs to question federal government witnesses who allegedly communicated with the San Francisco Police Department. The police report created by the San Francisco police in this matter states that FBI agent Paul Woods communicated with the San Francisco police about Ibrahim on the day of the arrest. Pipkin

Decl., ¶ 10, Exh. G. The police report also indicates that TSA Inspector Lee Korman communicated with the San Francisco police about Ibrahim's arrest. *See id.* Ibrahim has reason to believe that these individuals have information regarding the San Francisco police's alleged reason for Ibrahim's arrest.

Ibrahim therefore served subpoenas for testimony by Agent Woods and Inspector Korman on counsel for the federal government. *See* Pipkin Decl., ¶¶ 12-13, Exhs. H and I.

On November 9, 2009, counsel for the Department of State and the Department of Homeland Security and counsel for Ibrahim met and conferred regarding the subpoenas via telephone. *See* Pipkin Decl., ¶ 11.

### **ARGUMENT**

#### **A. The Federal Government Has Waived Any Privilege Objection to the Subpoenas Because It Failed to Timely Serve a Motion to Quash or Objections**

A motion to quash a subpoena must be made promptly. It must be heard and granted *before* the scheduled deposition. *See King v. Fidelity Nat'l Bank of Baton Rouge*, 712 F.2d 188, 191 (5<sup>th</sup> Cir. 1983). Furthermore, objections must be served within 14 days after service of the subpoena. *See* Fed. R. Civ. Proc. 45(c)(2)(B). Failure to serve timely objections waives all grounds for objection, including privilege. *See In re DG Acquisition Corp.*, 151 F.3d 75, 81 (2d Cir. 1998). Here, the federal government objected more than 14 days after service of the subpoenas for documents to the Department of Homeland Security and the Department of State, thereby waiving its objections. Furthermore, the federal government has never asserted any objections to the document requests attached to the subpoenas of Lee Korman and Paul Woods, thereby waiving any objection other than those based on the *Touhy* regulations.

#### **B. District Courts Apply Federal Discovery Rules to Discovery Requests Made Against Government Agencies, Whether or Not the Agency is a Party.**

In *Touhy v. Ragen*, 340 U.S. 462 (1951) the Supreme Court ruled that an FBI agent could not be held in contempt for refusing to obey a subpoena duces tecum when the Attorney General, acting pursuant to federal regulations regarding the release of official documents, had ordered him to refuse to comply. *Id.* at 469. The Court specifically refused to reach the question of the



power of agency heads to withhold evidence from a court without a specific claim of privilege. *Id.* at 467; *see In re Recalcitrant Witness Richard Boeh v. Gates*, 25 F.3d 761, 764 & n.4 (9<sup>th</sup> Cir. 1994) (noting that *Touhy* did not decide the legality of agency heads' executive privilege claim).

Title 5 of the U.S. Code, section 301 authorizes federal agencies to create regulations regarding the custody, use and preservation of their records as follows:

The head of an Executive department or military department may prescribe regulations for the government of his department, the conduct of its employees, the distribution and performance of its business, and the custody, use, and preservation of its records, papers, and property. ***This section does not authorize withholding information from the public or limiting the availability of records to the public.***

5 U.S.C. § 301 (emphasis added).

Section 301 does not authorize agency heads to withhold documents or testimony from federal courts. *See Exxon Shipping Co. v. United States Dept. of Interior*, 34 F.3d 774, 777 (9<sup>th</sup> Cir. 1994). Nor does it create an independent privilege to withhold government information or shield federal employees from valid subpoenas. *See id.* at 780. Rather, district courts should apply the federal rules of discovery when deciding on discovery requests made against government agencies, whether or not the United States is a party to the underlying action. *See id.*

**C. Ibrahim Has Issued Valid Subpoenas to Which the Government Must Be Compelled to Respond Because the Information is Discoverable Factual Information and Testimony of Percipient Witnesses.**

It is undisputed that Ibrahim properly requested the information she seeks by valid subpoenas for production of documents and testimony. Pipkin Decl., ¶¶ 5-6, 12-13 Exhs. B, C, H and I. Pursuant to *Exxon Shipping Co.*, the district court must apply the federal rules of discovery in ruling on the discovery requests. *See Exxon Shipping Co.*, 34 F.3d at 780.

**1. The Subpoenas for Documents Related to Ibrahim's Visa Status Seek Discoverable Information**

Pursuant to the Federal Rules of Civil Procedure, a party may obtain discovery regarding any nonprivileged matter that is reasonably calculated to lead to the discovery of admissible evidence. *See Fed. R. Civ. Proc.* 26(b)(1). At trial, a witness's testimony must be taken in open court, absent an exception. *See Fed. R. Evid.* 43(a). In trying issues involving the credibility of

witnesses, courts must proceed by the way of live testimony so that the rights of the parties will be protected to the fullest extent practical. *See U.S. v. Mejia*, 69 F.3d 309, 319 (9<sup>th</sup> Cir. 1995). It is substantially prejudicial to deprive a party of the right to testify live in his or her own case. *See id.*

Ibrahim needs to travel here to testify in her case; indeed her testimony is critical evidence. The federal government's improper interrogation of Ibrahim in her visa interview and failure to act on Ibrahim's visa application raise serious questions about the reasons that Ibrahim's visa is being withheld. Ibrahim's visa subpoenas seek information that she needs to determine the status of her visa application. Without this information, she is unable to determine what she needs to do to secure her opportunity to travel here.

## **2. The Subpoenas for Testimony by Paul C. Woods and Lee Korman Seek Discoverable Information**

For the purposes of discovery, "information is 'relevant' if it relates to the claim or defense of the party seeking discovery or any other party, or to the credibility of any witness." *Cable & Computer Technology, Inc. v. Lockheed Saunders, Inc.*, 175 F.R.D. 646, 650 (C.D. Cal. 1997) (quoting Schwarzer, Tashima & Wagstaff, California Practice Guide: Federal Civil Procedure Before Trial, § 11.21 (1995 revised)). Rule 26 permits the discovery of information which may simply relate to the credibility of a witness or other evidence in the case. *See Oakes v. Halvorsen Marine Ltd.*, 179 F.R.D. 281, 283 (C.D. Cal. 1998).

Here, the San Francisco police department has made clear that it intends to justify its arrest of Ibrahim based on information allegedly received from the federal government about Ibrahim. Ibrahim therefore needs the testimony of Agent Woods and Inspector Korman to determine the credibility of the San Francisco police department's assertions. According to the police report, these two federal officials have information regarding what the police were told on January 2, 2005 by federal officials and what information the federal government relied upon regarding Ibrahim. Such information is essential to determine the credibility of the San Francisco police department's statements.

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1                   **3. The Cases Cited by the Federal Government for the Proposition that**  
 2                   **Ibrahim Must Undergo the *Touhy* Procedures Do Not Apply**

3                   The federal government cites several cases to support its view that the *Touhy* regulations  
 4 require that the subpoenas in question be quashed. However, these cases are inapplicable. *In re*  
 5 *Recalcitrant Witness Boeh*, cited by the government, held that an FBI agent could not be held in  
 6 contempt for failing to comply with a subpoena for testimony after the Attorney General denied  
 7 permission for the agent to testify. *See In re Recalcitrant Witness Boeh*, 25 F.3d at 767.  
 8 However, the Court emphasized that the recalcitrant government witness was not a percipient  
 9 witness to the events at issue. Therefore, the Court did not address any questions of application  
 10 or interpretation of the *Touhy* regulations that are posed in such a case. *See id.* at 766, n. 8.  
 11 Unlike *Boeh*, in this case, the information sought is from percipient witnesses and parties who  
 12 not only possess direct factual knowledge but also documents relied upon during the incident  
 13 (such as Ibrahim's status on the No-Fly List) and created contemporaneously with the incident  
 14 (such as phone logs). Forcing Ibrahim to undertake collateral proceedings to obtain information  
 15 and documentation from federal percipient witnesses will effectively eviscerate her right to the  
 16 requested testimony and documentation. *See Exxon Shipping Co.*, 34 F.3d at 780, n.11 (citing *In*  
 17 *re Recalcitrant Witness Boeh*, 25 F.3d at 770 n. 4 (Norris, J., dissenting) and stating that in such  
 18 cases, the need for district court review is all the more compelling).

19                   Likewise, the information sought by the criminal defendant in *United States v. Henson*,  
 20 123 F.3d 1226, 1237 (9<sup>th</sup> Cir. 1997), *rev'd on other grounds*, 165 F.3d 689, 692, n.5 (9<sup>th</sup> Cir.  
 21 1999) was obtainable by other means, namely questioning a witness directly about the  
 22 information. *See Henson*, 123 F.3d at 1237. Here, Ibrahim thus far has no access to any federal  
 23 witness regarding the information she seeks.<sup>2</sup>

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 28 <sup>2</sup> *FBI v. Superior Court of the State of Cal.*, 507 F. Supp.2d 1082, 1093 (N.D. Cal. 2007) cited  
 by the government, also does not compel the result sought. In *FBI*, the subpoenas in contention

**D. Even If *Touhy* Applies to the Discovery Requested, Ibrahim Has Already Complied with *Touhy*.**

As explained above, the Court has the power to rule on the discovery requests at issue. However, if it is determined that Ibrahim must first comply with the *Touhy* regulations, she has already done what the federal government requests in its motion to quash. Namely, the federal government argues that Ibrahim must explain the relevance of the information and documents she seeks under the applicable *Touhy* regulations. By this opposition and meet and confer conversations with counsel for the federal government, Ibrahim has already explained the relevance of the information sought. Yet, it is important to note, that the federal government has not stated that it will agree to provide any information even if Ibrahim does go through additional procedures. If there is anything further required by the *Touhy* regulations in the view of the federal government, Ibrahim requests that she be informed of that immediately. Furthermore, Ibrahim requests that the proper agency officials take action on her requests so that she may expeditiously resolve this issue.

**E. Ibrahim Seeks Leave to Amend Her Complaint to Add Claims Against the Federal Agencies For Their Refusal To Provide Requested Discovery**

In *Exxon Shipping Co.*, the Ninth Circuit considered claims brought directly by a party against federal agencies for the agencies' failure to comply with discovery requests. *See Exxon Shipping Co.*, 34 F.3d at 776. Because the federal government refuses to comply with discovery requests in this matter and indeed, is holding the entire case up by its inaction on various discovery issues, Ibrahim seeks leave to amend her complaint to add the following claims against

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were issued by a state court prior to removal to the district court. Under principles of sovereign immunity, the state court did not have the power to compel federal government employees to submit to subpoenas or court orders. *See FBI*, 507 F.Supp.2d at 1087-88. Unlike *FBI*, this case is and always has been pending in federal court so no such issue presents itself. *Lopez v. Chertoff*, 2009 WL 1575209 (E.D. Cal.) also relied upon by the government, is an unpublished opinion that is not binding on the Court.

1 FBI, TSA, TSC, DHS, and the Department of State: (1) the government's refusal to provide the  
2 requested discovery violates the Federal Rules of Civil Procedure and the U.S. Constitution  
3 because, *inter alia*, the United States is a *de facto* party to this action; (2) the agencies' actions  
4 regarding discovery in this matter are not authorized by 5 U.S.C. § 301, or federal regulations  
5 promulgated pursuant to the statute; and (3) the agencies' actions are unlawful under the APA, 5  
6 U.S.C. § 702 *et seq.*

### 7 CONCLUSION

8 The documents and testimony Ibrahim seeks are reasonably calculated to lead to  
9 admissible evidence. The federal government has waived its objections to the subpoenas at  
10 issue. Furthermore, the district court must apply the rules of civil procedure in weighing the  
11 subpoenas at issue because the *Touhy* regulations do not create an independent privilege for the  
12 federal government to withhold relevant information. In the alternative, even if the *Touhy*  
13 regulations apply, Ibrahim has already complied with them and requests that the proper federal  
14 government officials take action on her requests so that she may proceed with this matter.  
15 Finally, Ibrahim requests leave to amend her complaint to assert claims against the relevant  
16 federal agencies for failure to comply with discovery.

17  
18 DATED: November 19, 2009

McMANIS FAULKNER

19  
20 By: /s/ Elizabeth Pipkin

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